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not there is a contract, express or implied, to perform this duty in a given instance. The character of the paper may be a consideration beyond all this, depending upon whether he who accepts or certifies is a mere bailee or a principal party in the transaction.

XI. As the dealings of men have thus changed in their general characteristics, it is expedient to consider how far applicable to the new combinations are the old tests of commercial law. The scientific distinction between a check and a bill, if it is correctly stated at the beginning of this note, certainly remains to this day unaffected by those changes; but the modes by which in given instances that distinction used to be ascertained are no longer safe, or even available. A check, in commerce, may be payable in future; may be accepted; need not be drawn upon a bank or banker; need not represent at its date a sum of money actually on deposit with the drawee. But such a check, in law, would be a bill. If the fact was established, however, that such a check was, after all, merely an appropriation of funds held by a bailee upon deposit, the presumption of law that it was a bill

would be modified, and the paper would remain a check. In the absence of a statutory provision for grace, such a check would be immediately payable at maturity. But the essential fact thus suggested would necessarily have to be admitted,—be found by a jury,—or be established by what is analogous to a verdict. Otherwise, at law, grace would be a matter of right.

It seems clear, then, that where there is no legislative provision for grace, a check is never entitled thereto; and that in every instance the question of grace must be settled by the special circumstances of the instance itself, that is to say, by the terms of the contract of the parties. The general principle is beyond discussion. If it does not operate in a special case, it is because it has no application, or because being *prima facie* applicable, some statute has created an exception to it, or the agreement of the parties has validly excluded that case from its scope. But this does not lessen the frequent difficulties of deciding whether or not, in law, the paper examined is a check at all.

W.

Supreme Court of Errors of Connecticut.

DALE v. GEAR.¹

The contract implied by law from a blank endorsement of a negotiable note before maturity by the payee, is as certain and absolute as if written out in full, and parol evidence is not admissible to contradict it.

This rule is applicable between endorser and endorsee, and it is not competent for the former to prove a cotemporaneous, naked agreement, that an unrestricted endorsement should be operative as a restricted one only in bar of an action by the latter.

But any fact or transaction which raises an equity between such parties, and shows it to be inequitable or a fraud to enforce the contract,—as that the endorsee

¹ We are indebted for this case to the courtesy of Mr. HOOKER, the Reporter.—
EDS. AM. LAW REG.

is an agent, or that the note was endorsed for a special purpose creating a trust, or for the accommodation of the endorsee, or pursuant to an antecedent agreement that the note should be taken for a debt or for goods, on the responsibility of the maker alone, may be shown by parol in bar of the action.

ASSUMPSIT against the defendant as endorser of a promissory note; brought to the Court of Common Pleas in the county of New Haven.

The defendant pleaded in bar, "that the said plaintiffs ought not to have or maintain their aforesaid action against the defendant, because he says that at the time when the defendant so as aforesaid endorsed said note, in consideration of the agreement of the said defendant to endorse said note in blank, and to omit prefixing the words 'without recourse' to his said endorsement, they, the said plaintiffs, by parol, then and there promised and agreed that they never would have recourse to the said defendant upon said note or upon said endorsement, but would for ever save him, the said defendant, harmless from all liability by reason of his making said endorsement in blank, and omitting to prefix the the words 'without recourse' to his said endorsement. And the defendant avers that upon the faith of the aforesaid promise and agreement of the said plaintiffs, and in consideration thereof, he did so as aforesaid endorse said note in blank, and did omit to prefix the words 'without recourse' to said endorsement. All which he is ready to verify. Wherefore he prays judgment," &c.

To this plea the plaintiffs demurred, and the case was reserved upon these pleadings for the advice of this court.

L. H. Bristol, in support of the demurrer, cited 2 Parsons on Notes and Bills 23; Smith's Merc. Law 128, 129; *Prescott Bank v. Caverly*, 7 Gray 217; *Riley v. Gerrish*, 9 Cush. 104; *Woodbury Savings Bank v. Charter Oak Insurance Co.*, 29 Conn. 381; *Hoare v. Graham*, 3 Camp. 57; *Goupy v. Harden*, 7 Taunt. 159; *Free v. Hawkins*, 8 Id. 92; *Odam v. Beard*, 1 Blackf. 191; *Wilson v. Black*, 6 Id. 509; *Fuller v. McDonald*, 8 Greenl. 213; *Crocker v. Getchell*, 23 Me. 392; 1 Chitty Pl. 233, 234; *Wyat v. Aland*, 1 Salk. 325; *The King v. Stevens*, 5 East 244; *Perkins v. Catlin*, 11 Conn. 213; *Castle v. Candee*, 16 Id. 223; *Rey v. Simpson*, 22 How. 341; *Downer v. Chesebrough*, 36 Conn. 39; *Wells v. Jackson*, 6 Blackf. 40.

J. S. Beach, contrà, cited 1 Swift's Dig. 434; *Perkins v.*

Catlin, 11 Conn. 213; *Castle v. Candee*, 16 Id. 223; *Case v. Spaulding*, 24 Id. 578; *Hill v. Ely*, 5 S. & R. 363; *Patterson v. Todd*, 18 Penn. St. R. 426, 434; *Birchleback v. Wilkins*, 22 Id. 26; *Riley v. Gerrish*, 9 Cush. 104; Chitty on Bills 144; *Pike v. Street*, M. & M. 227; 2 Parsons on Notes and Bills 519; *Tappin v. Clarke*, 32 Conn. 56; *Downer v. Chesebrough*, 36 Id. 39.

BUTLER, C. J.—We have given this case the consideration which, as involving an important commercial question, it has seemed to require, and are of opinion that the plea cannot be sustained on principle or by authority.

First, it is not sustainable on principle.

The rule that parol evidence is not admissible to contradict or vary a written contract is founded in the highest principles of public policy, and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes. Nor is there any one of the varied and special contracts, so connected, in respect to which the application of the rule is more important than the contract of warranty implied by law from the blank endorsement of a negotiable note by the payee before maturity. It is absolutely essential to the negotiability of such a note that the rule to which we have alluded should be applied to it, and it has always been so applied when the note has been negotiated to a second endorsee, and an effort has been made to prove some cotemporaneous parol agreement in bar.

But it has sometimes been claimed, and is claimed in support of the plea in this case, that notwithstanding the rule is so applied in favor of a *bonâ fide* holder to whom the note has been negotiated, yet as between the endorser and endorsee, the original parties to the contract of endorsement, the rule should not be applied. But the answer must be, that the contract of endorsement is implied by law as clearly and perfectly from the blank endorsement of a negotiable note, irrespective of any contingency of negotiation, as if written out in full when endorsed. And if, as between the original parties, there is any equity existing *dehors* the instrument, which should prevent the indorsee from enforcing the contract, it must be set up *as an equity* provable in equity, to bar an apparent legal liability; and cannot be shown because the rule of evidence to which we have alluded is not applicable. The rule is as appli-

cable to such parties as to others, and the true theory is that the relation or antecedent agreement, out of which the equity arises, may be shown between them, and proof of it does not necessarily contradict the contract.

There are four classes of cases in which, as exceptional cases, and as between the original parties, endorser and endorsee, any relation, antecedent agreement, or state of facts from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus the relation of principal and agent may be shown—for the agent takes no title or warranty from the endorser, but holds *as agent*. So, secondly, it may be shown that the note was endorsed to the holder for some special purpose, and is holden *in trust*, as where it is endorsed and delivered for collection merely. *Lawrence v. Stonington Bank*, 6 Conn. 521, is an example of this class of cases in our own reports. In like manner, thirdly, the relation of principal and surety may be shown, and that the endorsement was made at the request and for the accommodation of the immediate endorsee, for the equity of the relation forbids the enforcement of the contract. Such was *Case v. Spaulding*, 24 Conn. 578. So, fourthly, it may be shown that there was an *equity* arising from an *antecedent transaction*, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was endorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a *fraud*. Such was *Downer v. Chesebrough*, 36 Conn. 39. These exceptions illustrate the rule. But this plea shows no agency, trust, equitable relation or equity connected with an antecedent transaction constituting a consideration for the agreement, or which would justify a court of equity in interfering to prevent an enforcement of the contract of warranty which the law implies. It presents a naked case of an attempt to prove by parol, that a clear and unambiguous contract of warranty is not such, and to contradict it in terms—to turn an endorsement *without restriction*, before maturity, into a *restricted endorsement*. Such a plea cannot be sustained without a violation of essential principles.

Nor is the plea supported by any well-considered and unquestioned authority.

The defendant claims, in the first-place, that it is supported by the decisions of this state, and he relies on a class of cases where

the action was upon a non-negotiable note, or a negotiable note endorsed by one not a party to it, which by our law stands on the same ground. But those decisions cannot sustain him. That class of blank endorsements is not controlled by commercial usage, and does not import an absolute contract of warranty. The contract presumed by law from them is presumed *primâ facie* only, and differs in different states. In this state such endorsements are not only *primâ facie*, but conditional, that is, that the note shall be collectible of the maker by due diligence. In Massachusetts and New York such an endorsement is treated as an absolute guaranty, or the endorser charged as a joint promisor. In all the presumption is treated as one of fact, rather than one of law, and the real contract made between the parties, if a special one, may be written over the signature of the endorser. It is otherwise in a note like this.

There are then broad lines of distinction between the two classes of endorsements, and the defendant's plea is not supported by the class of decisions referred to.

The defendant also relies on *Case v. Spaulding*, 24 Conn. 578, but it does not sustain him. There the defendant was not the payee, and as second endorser was not liable to the payees of the note, for they, as first endorsers, were bound to pay it. The defendant also endorsed at the request of the plaintiff as surety, for his accommodation, and was within one of the classes of equitable exceptions, where the relation on which the equity rests may be shown. The dictum of Judge ELLSWORTH, confined within the limits called for by the case, was undoubtedly true, but the defendant does not bring himself within the exception.

The defendant further relies on *Downer v. Chesebrough*, 36 Conn. 39, but he is not sustained by that case. It was not put to us as a case where the antecedent contract which created an equity between the parties could not be shown under our law, if the contract had been made here, in connection with the agreement claimed, to show that the plaintiff was attempting to perpetrate a *fraud*, but as a case where, by the laws of New York, where the contract was made, it could not be proved *by parol*. The case turned therefore solely on the question whether the law of evidence of the *forum*, or of the *lex loci contractus*, should govern. In that aspect only we considered and decided it, and that question alone is discussed in the opinion. If the questions which are raised

here had been raised there, we should have holden without hesitation, first, that the endorsement of a negotiable note before maturity by the payee creates an absolute warranty to the immediate, as well as all subsequent endorsees, that the instrument and the antecedent signatures thereon are genuine; that the endorser has title to the instrument and is competent to bind himself by the endorsement, and that the maker will pay it on due presentment when it is due; but that, if he does not, the endorser will pay it if due notice is given him of such dishonor; and, secondly, that no special agreement—as that the unrestricted endorsement was intended or agreed to be a restricted one—can be shown by parol evidence, except in the classes of cases adverted to, where an equitable relation existed between the parties in respect to the endorsement when it was made, which rendered the enforcement of the contract inequitable and fraudulent. Equity overrides all rights, and suspends the operation of all legal rules between original parties, when necessary to prevent a fraudulent use of them, and therefore the exceptions mentioned have been recognised and applied at law. *Downer v. Chesebrough* was clearly within one of the exceptions, but this case is not.

The defendant under his second point cites three cases from Pennsylvania to show that the contract set up in the plea was provable there by parol. On examining those cases we think the law of Pennsylvania is otherwise. The first case cited is that of *Hill v. Ely*, 5 S. & R. 363. The marginal note sustains his claim, but the case does not. In that case it appears that the defendant purchased coffee of the plaintiff upon an express agreement that the plaintiff should receive in full payment the notes of one Jabez Lamb, without the responsibility of the defendant. The notes were payable to the order of the defendant and were handed to the plaintiff, pursuant to agreement without endorsement. The plaintiff then said to the defendant: "Hill, you must endorse those notes;" to which Hill replied: "That is not our understanding." The plaintiff rejoined: "They are made payable to you; how will you convey them to me? You must endorse them, in order that I may collect them." Hill then said: "I endorse them, but remember I am not to be held responsible for their payment."

The case was put to the court by the distinguished counsel engaged, solely on the ground that the attempt of Hill to charge Ely upon his endorsement was a fraud, and the court so held.

They say : " The evidence offered went to prove a direct fraud in obtaining the endorsements, or their perversion to a use never intended—a fraudulent purpose." The court further say, that parol or extrinsic evidence would be received in chancery to reach such a fraud, and therefore would be received in their courts at law ; that the relief in equity would be grounded, not upon the admissibility of parol evidence as between such parties to contradict the writing, but to show extrinsic facts, raising an equity *dehors* the instrument, to prevent the fraudulent purpose. The court also say that the evidence was admissible to show a *trust* between Hill and Ely, for the purpose of collecting the notes and applying the proceeds in payment for the coffee. They recognise the leading case of *Hoare v. Graham*, 3 Campb. 57, as law, but distinguish it, because in *Hoare v. Graham* there was no allegation of fraud. The case is on all fours with *Downer v. Chesebrough*. In both there was an antecedent contract which raised an equity *dehors* the endorsement, which made the attempt to enforce the contract implied by law from the endorsement a fraudulent one, relievable in equity. It is implied in both decisions, that in a case like this, where no equity existed, such a contract could not be shown by parol.

Hill v. Ely was not overruled or shaken by the subsequent cases cited. *Patterson v. Todd*, 18 Penn. St. R. 426, was the case of a negotiable note, but it was endorsed by the payee when *overdue*, and there was no subsequent demand and notice. The main question in the case was, whether such a demand should have been made upon the maker, and notice given to the endorser. It was held that the endorsement was equivalent to drawing a new bill, and that demand should have been made in a reasonable time, and notice given of the dishonor. The court also held that under the circumstances of that case, the defendant might show by parol evidence, that he said he would not warrant the notes. But the court did not question the authority of *Hill v. Ely*, nor does it appear that it has ever been questioned. The remaining case cited from Pennsylvania was the case of a non-negotiable note. It has no bearing upon this case.

The defendant under his third point cites a case from Massachusetts, and dicta from Judge SHAW. But the note in that case was not negotiable, and the case and dicta are unimportant.

The defendant also cites one English case, that of *Pike v.*

Street, M. & M. 227, in support of his claim. It is sufficient to say of that case, that it is not directly upon the point, is contrary to the present current of English decisions, and was questioned in the recent case of *Foster v. Jolly*, 1 Crompt., Mees. & Ros. 703.

These are all the decisions cited by the defendant, and there is not one of them directly in point, which can be relied upon as authority.

On the other hand, the current of decisions in England is directly against the admission of such evidence. *Hoare v. Graham*, 3 Campb. 57; *Goupy v. Hardy*, 7 Taunton 159; *Free v. Hawkins*, 8 Id. 92.

And the adverse decisions in this country which are directly in point are quite numerous. *Bank of Albion v. Smith*, 27 Barb. 489; *Thompson v. Ketcham*, 8 Johns. 146; *Patterson v. Hull*, 9 Cowen 747; *Payne v. Ladue*, 1 Hill 116; *Hall v. Newcombe*, 7 Id. 416; *Odum v. Beard*, 1 Blackf. 191; *Fuller v. McDonald*, 8 Greenl. 213; *Crocker v. Gretchel*, 23 Maine 392; *Wilson v. Black*, 6 Blackf. 509; *Barry v. Morse*, 3 New Hamp. 132.

The Superior Court must therefore be advised that the plea is insufficient.

The distinction made in the foregoing opinion between showing by direct evidence that the endorsement was a limited one, for a special purpose, and showing the same by the relation of the parties or the nature of the transaction, in order to raise an equity or trust in the endorsee for the benefit of the endorser, seems rather thin and shadowy to the unprofessional mind. But, in regard to certain classes of cases, it is no doubt well founded in law. But if we understand the full force of the decision, it seems to us to rest solely on the ground, that the plaintiff, in attempting to enforce the endorsement according to its legal force, is perpetrating a fraud upon the defendant. The defence of fraud, in an action of *assumpsit*, is always available by way of special plea, although it may with equal propriety be given in evidence under the general issue; and it may always be shown by oral proof, although such proof may contradict a

written contract. This is always admissible by way of defence, because the proof is received to show fraud, or trust, growing out of the transaction, and not for the purpose of contradicting, or giving a new construction to, the written contract. This rule is applied in the familiar case of giving an absolute deed of land, intended merely for the security of a debt, which the grantee is attempting to enforce according to its terms. And the same will be true, where property, real or personal, is conveyed to one, where the consideration proceeded from another; the law will raise an implied or resulting trust, which may be enforced in a court of equity, not coming within the terms of the Statute of Frauds. Many other cases might be stated, and any number of authorities cited in support of the general proposition involved—that fraud or trust may be shown in defence of an action of *assumpsit*, where the entire right is in the defendant. If

the case rests upon mere trust, still subsisting, the proper remedy will be in equity, as when the plaintiff holds the property in security for debts, not embraced in the action. Authority will scarcely be needful in support of such elementary principles.

But upon the main question involved in the case, how far a blank endorsement upon a negotiable promissory note is explainable by oral proof, if made while the note is current, or not overdue, there seems to be considerable conflict in the cases. Mr. Justice STORY, Promissory Notes § 148, lays down the rule as doubtful, or not fully settled by the English cases, citing *Free v. Hawkins*, 8 Taunt. 92, *Hoare v. Graham*, 3 Camp. 57, as having intimated an opinion against the admissibility of such evidence in explanation or contradiction of the *primâ facie* legal intentment of the endorsement. But adds: "These doubts, however, have been overcome in America, and the doctrine is established that such evidence is admissible:" citing *Taunton Bank v. Richardson*, 5 Pick. 436, 443; *Central Bank v. Davis*, 19 Id. 373, 375; *Leffingwell v. White*, 1 Johns. Ca. 99; *Union Bank v. Hyde*, 6 Wheat. 572.

The general rule of the American law unquestionably is, that, while a blank endorsement of a note or bill will have a *primâ facie* legal significance, which, in the absence of proof to the contrary, must prevail, it is nevertheless competent, in ordinary cases, to show by oral proof, that such was not the nature of the obligation intended to have been assumed by the endorser. This has been held to be law certainly as to all notes not negotiable, and especially when endorsed by those not before parties to the contract: *Jocelyn v. Ames*, 3 Mass. 274; *Nelson v. Dubois*, 13 Johns. 175; *Barrows v. Lane*, 5 Vt. 161, where PHELPS, J., says: "Whatever may be the effect of a blank signature as it respects third persons, in case it is attached to negotiable paper, yet as between the original parties

their actual understanding and agreement is always to be regarded." And in *Curver v. Warren*, 5 Mass. 545, PARSONS, Ch. J., says: "If, as has been suggested, the defendant endorses his name as guarantor, and the present endorsement has been made [or] filled up without his consent, or any authority from him, he should not have demurred, but should have pleaded the general issue, and on the trial he might have availed himself of this defence." But these are cases where the notes were not negotiable, and the endorsement by those not before parties to the contract. But even in such cases the authorities already cited and many others show that the blank endorsement, *primâ facie*, imposes the obligation of an original maker. And we should have said, that a blank endorsement by the payee of a promissory note expresses only a *primâ facie* obligation. We see no good reason why such an obligation, as between the parties to it, should be held any more sacred because the instrument is negotiable than in any other case of blank endorsement. The truth is that a blank endorsement is always held to import nothing absolutely, and may always be shown to have been given for a different purpose from that to which it has been applied. It has sometimes been said even, that parties will be affected by any equity between the parties to a blank endorsement, provided they are informed, before they accept it, that it was given in blank: *Russell v. Langstaffe*, 2 Doug. 514. This would not probably be held to extend to the endorsement of a negotiable promissory note by the payee while it was still current, for that is the common mode of making such notes and bills negotiable in the market, and any one who fairly became the holder might lawfully fill up the endorsement in the usual mode. "Pay the contents to the bearer, value received." And perhaps it is fair to say, that oral evidence is no more admissible to explain or contradict the

endorsement when made in blank than when made in full. The fact that its real import may always be shown, when the endorsee attempts to enlarge his rights by making broader claims than his just rights entitle him to make, in order to establish fraud, amounts practically to the same thing as receiving the evidence in explanation or contradiction of the endorsement, and at the same time preserves the symmetry of the law. In the case of *Ross v. Espy*, 66 Penn. St. R. 481, it is decided that the actual contract may be shown in all cases of blank endorsement, citing numerous cases in that state. And we must say we have always regarded this as the settled law.

The abstract question, whether the legal intendment of a contract or instrument is any more open to explanation by oral proof, than the very language used is one which can properly admit of no doubt. The legal or natural implications, attendant upon the use of a term, are as much a part of the "language" of a contract or instrument, as are the more direct and explicit meanings attached to the words. "One hundred pounds" admits of no latitude of construction except with reference to the

commodities to be estimated, *i. e.*, whether of troy, avoirdupois or apothecary standard. But "one hundred weight" carries, by implication, twelve additional pounds, avoirdupois; and, unless controlled by usage, is no more subject to contradiction or deduction, than are the hundred pounds itself. The same has been held in regard to the boundaries of land. A given number of acres off from a particular part of the lot, implies that the section shall be separated by lines corresponding with the lot lines, and this implication cannot be explained or contradicted by oral proof: *Beecher v. Parmelee*, 9 Vt. 352; *Rich v. Elliot*, 10 Id. 211. The same rule is recognised in the construction of wills. The primary and natural import of the words must prevail unless that becomes impracticable, when a secondary meaning may be resorted to, in order to escape some otherwise inevitable absurdity. The decision of the principal case is most unquestionable upon general principle; how far blank endorsements may be treated as exceptional, we need not further inquire.

I. F. R.

Supreme Court of Errors of Connecticut.

GRAVES v. THE HARTFORD AND NEW YORK STEAMBOAT COMPANY.

It is a clear duty belonging to common carriers of merchandise under their contract, to deliver his goods to the consignee if he presents himself at the proper place and in proper time to receive them, and, in such case, there is no room, nor any occasion, for the interposition of a warehouseman, although the carriers make known and regular transits, and have a warehouse and platforms for the delivery of goods at the end of the transit; and the carrier is not discharged from liability as a carrier, by placing such goods either on the platform or in the warehouse for delivery. And the consignee is entitled to a fair and reasonable time and opportunity to receive his goods, and until he has had such time and opportunity, the goods remain in the care of the carrier as such.